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Supreme Court of the United States

No. 74-118

C. G. BISHOP, ADMINISTRATOR OF THE ESTATE OF ARTHUR LEE BAKER, JR., DECEASED, PETITIONER,

v.

S. HENDRICKS, JR., RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

No. .....

C. G. BISHOP, Administrator of the
Estate of Arthur Lee Baker, Jr.,
Deceased, Petitioner,

S. HENDRICKS, JR., *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Lower Court has not created a conflict between the decisions of the Federal Appellate Courts.

Without question, the Fourth Circuit Court of Appeals did state, as is noted by counsel for Petitioner, that the rule announced in *Miller v Perry*, 456 (F2d) 63 (4th Cir. 1972) and applied herein was manifestly intended as a declaration of a substantial change in diversity jurisdiction. However, the Court attempted, in every instance, to reconcile this approach with the more recent decisions of the other Circuit Courts wherein 28 U.S.C., Sec. 1359 has been construed and interpreted. In fact, the Fourth Circuit Court of Appeals pointed out that the *Miller* rule is merely an application of the rationale employed by the United States Supreme Court in *Kramer v Caribbean Mills*, 394 U.S. 823 (1969), which principle has been applied by all of the Federal Courts confronted with this issue since the date of that decision.

Rather than rejecting motive as a criterion in determining the validity of the appointment of an out-of-state administrator

for diversity jurisdictional purposes, the Lower Court readily acknowledged that "if there is a valid reason for the appointment of . . . [an individual to such an office] that gives to his representation greater substantiality than a mere administrator *ad litem*, the citizenship of the administrator may be determinative of diversity." The Fourth Circuit Court of Appeals thus reaffirmed the validity of the principle that counsel for Appellant contends was repudiated in a manner so as to create a conflict between the decisions of the Federal Appellate Courts, and noted that such recognition was implicit in *Miller*.

It is also respectfully submitted that no decision has been discovered wherein the rule of this case has been advanced before and rejected by any Federal Court post-*Kramer*. Under these circumstances, we find it difficult to agree with counsel for Appellant that the Fourth Circuit Court of Appeals has created a conflict between the decisions of the Federal Appellate Courts. If such a conflict exists it is only latent in nature and would more properly be resolved in a controversy wherein the conflict, if any, is overt and patent. In other words, the Respondent contends that it would be premature to have this issue adjudicated in this proceeding.

2. If this Court deems the Lower Court's ruling to have created a conflict between the decisions of the Federal Appellate Courts the Respondent would urge this Court to ratify the rule of the Fourth Circuit by denying the relief sought by the present Petition and refusing to grant the Writ prayed for therein.

The rule announced in *Miller* and effectuated below is one of the most recent judicial pronouncements in this field of law. Moreover, the Federal Courts have, subsequent to *Kramer*, apparently experienced a certain amount of difficulty in resolving questions raised under 28 U.S.C., Sec. 1359. In many instances, as is noted by the Lower Court, other Federal Courts have decided such issues on the bases of considerations as were utilized herein. Such an approach has now been more definitely enunciated and, it is respectfully submitted, should be sanctioned by this Court by refusing to grant the Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

J. D. TODD, JR.
Counsel for Respondent